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IN THE

Supreme Court of the United States

536

October Term, 1946

CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,

Petitioners,

vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Argument

In the above entitled case, your attorney has received a copy of Respondent's brief in opposition to Koza's Petition for a Writ of Certiorari and makes comments thereon as follows:

On page 2 of Petitioner's brief, he set forth in substance, Section 5b of Rule 38 of the Rules of the Supreme Court. He

followed this with a short general allegation at the top of page 3 but Petitioner submits that he is not limited to the construction that Respondent seeks to put upon it.

The statement set forth at the top of page 3 of Petitioner's Brief is believed to be broad enough to include everything that goes before it in paragraph 5b and is believed to leave additional room for the Court to use its discretion in addition thereto, in any way that it sees fit.

Petitioner did not intend to be limited to the allegation as a narrow statement. The jurisdiction of the Court is invoked on the whole rule as set forth at the bottom of page 2.

That the jurisdiction of the Court is invoked as above set forth appears further on pages 17, 18 and 19 of Petitioner's brief where he alleges that the Lower Court erred in failing to apply the law in four particulars, and the four paragraphs; namely, 4, 5, 6 and 7 are presented because in each of them is involved an important question of Federal Law, which has not been but should be settled by this Court or because the Lower Court had positively or by inference decided a Federal question in a way probably in conflict with the applicable decision of the Supreme Court. The four paragraphs beginning with paragraph 4 on page 17 were embodied in the brief because of these statements in Section 5b of Rule 38 and the four paragraphs are believed to outline departures "from the accepted and usual course of judicial proceedings as to warrant the Supreme Court to exercise its power of supervision and its sound judicial discretion."

If the Petition is allowed, Respondent will have ample opportunity to comment on the merits of all of Petitioner's brief.

Referring to Respondent's brief as set forth in the last paragraph of page 3 and page 4, Petitioner states as follows:

It is true that on page 3 of Petitioner's brief, he said that the Drexler patent #2,147,832 in suit had been assigned to

the Drexler Company. The fact is that the Drexler Company was licensed under the patent and is a party to this suit. This is believed to be a harmless error.

At the bottom of page 3, Respondent's brief alleges that Koza's statement with regard to Puget Sound Navy Yard tool was unfounded. This is error. Koza testified as to this tool at the bottom of page 79a.

At the top of page 4 he says that there is no proof in the records that Exhibits A and B were witnessed by one Eric Ischinger. This is error.

Mr Koza testified to Mr. Ischinger witnessing his signature at the bottom of page 81a and a comparison between the signature of Mr. Ischinger on Exhibit B with the signature of Mr. Ischinger on the drawing of the Koza patent will show that they are the same.

This drawing appears on page 199 of the Appendix Exhibits. Plaintiff has put in evidence a certified copy of the application record of this Koza patent and Eric Ischinger's signature appears at least three times in that certified copy.

The statement is also made that there is nothing in the record to support the assertion that the Angle Drill of Exhibits A and B was a secret disclosure. This is error.

On page 77a Mr. Koza makes the statement that he had never made any drills in accordance with Exhibits A and B. His statement reads as follows:

"I never had any tools made to this blue print at all."

The blueprint referred to is Exhibit A. This appears eleven lines above on the same page 77a. Furthermore, at the bottom of page 22a and top of page 23a Drexler testified as follows:

"He (Koza) confided in Mr. Morgan—He (Koza) confided in him (Mr. Morgan) that he was looking for

> a source to manufacture an Angle Drill Attachment, to take care of the Aviation Trade; and he told Mr. Morgan and showed him what he had in mind."

On page 4, the statement is made that there is nothing in the record to support the assertion that Koza ever made the drawing of Exhibit U while in Baltimore, Md. or at any other time. This is error.

On page 98 of the record Mr. Koza testified that he made the drawing of Exhibit U and that the date on the drawing is correct, and on the drawing appears the words—

> "sketched by C. A. Koza 9/28/36 at Baltimore, Md."

and Mr. Koza testified on page 84a that "the date on a drawing should never be changed."

On page 4 the statement is also made that there is no evidence to support the statement that Koza made the disclosure of the invention in suit by drawing in pencil, blueprint or otherwise. This is error.

At the bottom of page 80a Koza says—

> "I bent over the drawing board alongside of Morgan and picked up a pencil and drew this ball in there and I asked him 'What do you think of this idea of a ball to take up the thrust and prevent the gears from crowding into each other.' "

The incident is elaborated on page 80a just before and just after this particular answer of Koza.

On page 4, Respondent's brief states that there is nothing in the record to support the statement that Drexler could not have written the specification and claims of the patent in suit.

There is nothing in the record to show that Drexler was qualified to write the specification and claims for an applica-

tion for patent. The Supreme Court has said in *Topliff vs. Topliff*, 145 U. S. 156:

> "The specification and claims of a patent particularly if the invention be at all complicated constitute one of the most difficult legal instruments to draw with accuracy, etc."

and Rule 17 of the Patent Office advises the applicant to employ a competent registered attorney.

Page 4 of the Respondent's brief also alleges that Koza filed and prosecuted his patent application without claiming the invention in issue, but page 69— explains why Koza did not copy the claims from the Drexler patent and go into Interference. He was too poor to fight the Interference, and the Patent Office in allowing the Drexler patent without the Declaration of an Interference prejudiced Koza's rights, and seriously injured Koza in so doing.

On page 7 Respondent alleges that Petitioner is really seeking a review of the facts and presumptions arising from the testimony of the witnesses and exhibits offered.

If this is true or objectionable, then why has Respondent raised the seven questions of facts above referred to.

Respondent's Brief cites five cases for the purpose of showing that the Supreme Court will not consider the evidence or disturb findings of fact. Two of his cases, however, prove too much.

In *United States against Johnston*, 268 U. S. 220, cited by respondent, the Court said—

> "We do not grant a certiorari to review evidence and discuss specific facts."

yet in that case the Supreme Court reversed the Court of Appeals and affirmed the verdict of the jury.

In *United States against Chemical Foundation*, 272 U. S. 1, 14 the Court held that—

> "Findings of fact concurred in by two lower courts will not be disturbed, unless clearly erroneous. Washington Sec. Co. vs. United States, 234 U. S. 70, 78, 34 S. Ct. 725, 58 L. Ed. 1220. Under this rule the findings must be accepted."

The opinion, however, shows that the Court did consider some of the evidence. See pages 15 and 16 of the decision. At the top of page 16 the decision reads as follows:

> "The president's order also states that it was the *intention* of the Polk orders to authorize the custodian to sell 'all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description,' etc."

The Court modified the decree.

In *Precision Instrument Manufacturing Company against Automotive*, 324 U. S. 806 the Court did consider evidence in a patent case and reversed the Court of Appeals. This decision is referred to in Petitioner's Brief at page 27, wherein it is contended that Drexler concealed an important item of evidence from the Patent Office which if disclosed to the Patent Office would have secured an interference with Koza before the Drexler Patent issued.

On pages 51 and 52 petitioner sets forth other items of evidence that Drexler should have communicated to the Patent Office, but did not.

Petitioner has already called attention to the fact that the brief decision of the Court of Appeals did not review the evidence. Errors in the findings of fact and the opinion of the lower court have been pointed out at length in petitioner's brief on page 15, under the head of "Errors Assigned". Petitioner submits that he is entitled to have these errors enquired

into because there is no affirmative proof that they were enquired into or taken seriously by the Court of Appeals, and because the brief decision Court of Appeals is utterly lacking in detail it should not be given the standing that it would be entitled to if the facts and the law had been commented on at length.

Fraud is alleged in this brief in the obtaining of the Drexler patent. The public has an interest in every patent and petitioner submits that the Drexler patent in this case is entitled to no more respect than was the patent under consideration in the *Precision Instrument* case, supra, and *Hazel-Atlas Glass Company vs. Hartford-Empire Company*, 322 U. S. 238-271.

Koza has charged Drexler with fraud in that Koza made the invention and disclosed to Drexler, and Drexler fraudulently applied for the patent and Koza at the time was poverty stricken and Drexler knew it, and Koza was not able to oppose Drexler in the Patent Office with an Interference Proceeding which is like a suit in Equity; because he didn't have $1000 or more to pay the expense thereof.

Petitioner's Brief suggests or states questions or propositions of law that it is submitted the Court should answer in disposing of this case.

These questions or propositions can be stated as follows:

1. Does the decision of this Court in *DuPont against Masland*, 244 U. S. 100, on Confidential Relations apply to the admitted facts of this case, and if so, with what result? The important facts are that Koza confided to Drexler a disclosure that was entirely new to Drexler and this disclosure got Drexler into the Angle Drill business. See pages 51 and 52 of Petitioner's Brief.

2. Where a disclosure is made by one experienced in the art to one who has had no experience in the art, for the pur-

pose of getting his assistance as a mechanic and there is a dispute as to the origin of the invention, there is a presumption that the invention originated with the one who has had experience in the art. See p. 50.

3. Where a customer has brought a drawng to a job shop for the purpose of developing the product illustrated therein and there is a dispute as to the origin of the invention, there is a presumption that the developed invention originated with the customer and not with the proprietor of the job shop. See p. 60.

4. Where a disclosure is confided by a customer who is experienced in the art to the proprietor of a job shop that has had no experience in the art, does the disclosure establish confidential relations between the customer and the proprietor of the job shop. See p. 9 and pp. 3 and 4, supra.

5. Where the special tools for making an invention are charged to the customer by the proprietor of a job shop, and there is a dispute thereafter as to the origin of the invention, there is a presumption that at the time the charge for the tools was made, that the parties agreed that the invention originated with the customer. See p. 22.

6. Can the employee who has accepted a disclosure from an employer dispute the origin of the invention with the employer and claim the invention as his own. See p. 47.

Petitioner submits that the answers to these questions or propositions are of great importance to the public and it is believed that the answers will favor petitioner's contentions.

Therefore, it is submitted that the petition for a writ of certiorari should be granted.

Rochester, N. Y., October 25, 1946.

Respectfully submitted,

FRANK KEIPER,

Attorney for Petitioner.